No. 80-11

NOV 20 1980

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In The

Supreme Court of the United States

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J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS; et al.,

Petitioners,

vs.

JICARILLA APACHE TRIBE; et al.,

Respondents.

—o—

On Certiorari To The Tenth Circuit Court of Appeals

—o—

BRIEF OF AMICUS CURIAE STATE OF MONTANA IN SUPPORT OF PETITIONERS

—o—

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Respondents.

On Certiorari To The Tenth Circuit Court of Appeals

BRIEF OF AMICUS CURIAE STATE OF MONTANA IN SUPPORT OF PETITIONERS

Pursuant to Rule 42 of the Supreme Court Rules, the State of Montana files this brief as *amicus curiae.*

INTEREST OF AMICUS CURIAE

The State of Montana has within its borders seven large areas of land set aside as Indian reservations.[1]

1. There are approximately 5,148,000 acres of tribal land and allotted individual land, comprising 5.5% of the total land within Montana. T. Taylor, The States & Their Indian Citizens 179 (1972).

Most of these reservations overlie massive amounts of mineral, oil, gas, and coal resources which the tribes have recently begun to develop.

The State of Montana imposes a coal severance tax and a gross proceeds from coal tax upon all coal severed from the ground in Montana.[2] The Crow Tribe of Indians has challenged application of the Montana taxes to non-Indian coal producers mining off-reservation coal in which the Tribe has a beneficial interest. The litigation is currently pending before the Ninth Circuit Court of Appeals. *Crow Tribe of Indians v. State of Montana, et al.*, 9th Cir. No. CA-79-4321. The Crow Tribe has also enacted a tribal coal severance tax on coal mining on the Crow Reservation, although there is not yet on-reservation coal mining. The Tribe is attempting to obtain approval from the Secretary of the Interior to impose a severance tax on coal in which the Tribe owns a beneficial interest but which lies outside the exterior boundaries of the Crow Reservation.[3]

The State of Montana also imposes various taxes on oil and gas production within the State.[4] The Blackfeet

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2. Montana Coal Severance Tax Act, Montana Code Annotated, 1979 (hereafter cited as "MCA"), §§ 15-35-101 through 15-35-110, and Montana Gross Proceeds From Coal Tax Act, §§ 15-23-701 through 15-23-704, MCA.

3. *See*, Solicitor's Memorandum, No. M- ———, "Tribal Jurisdiction over Non-Indians in Civil Matters: Approval of Various Ordinances of the Crow and Shoshone-Bannock Tribes" (October 13, 1976).

4. The Oil and Gas Conservation Tax, § 82-11-131, MCA; the Resource Indemnity Trust Tax, § 15-38-104, MCA; the Oil and Gas Severance Tax, § 15-36-101, MCA; and, the Oil and Gas Net Proceeds Tax, §§ 15-23-601, *et seq.*, MCA.

Tribe of Indians has challenged imposition of these taxes on oil and gas production by non-Indian lessees of the Tribe, and the litigation is currently pending before the United States District Court for Montana. *Blackfeet Tribe of Indians v. State of Montana, et al.*, No. CV-78-61-GF (D. Mont.). An issue raised by the Tribe's Complaint is whether the 1938 Indian Mineral Leasing Act, Ch. 198, 52 Stat. 347, 25 U. S. C. §§ 396a through 396f, implicitly repealed prior Indian mineral leasing acts.[5]

The State of Montana is also a Petitioner before this Court in *State of Montana, et al. v. United States of America, et al.*, No. 79-1128 (*cert. granted*, April 13, 1980). An issue present in that case is the extent of tribal power over non-Indians who are lawfully within the exterior boundaries of the Crow Indian Reservation.

Thus, several issues of major importance which are currently confronting the State of Montana are presented in this case for review. The Tenth Circuit's erroneous decision below, if allowed to stand, will have a detrimental affect on the State of Montana, its citizens, and the litigation described above.

Amicus will limit its argument to the questions which most directly affect it: the authority of Indian tribes to tax nonmembers and the authority of states to tax mineral production on Indian lands.

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5. For example, the Act of February 28, 1891, Ch. 383, Sec. 3, 26 Stat. 795, 25 U. S. C. § 397; the Act of May 29, 1924, Ch. 210, 43 Stat. 244, 25 U. S. C. § 398; and, the Act of March 3, 1927, Ch. 299, 44 Stat. 1347, 25 U. S. C. §§ 398a through 398e.

ARGUMENT

I. The Jicarilla Apache Tribe has no authority to exact funds from petitioners, except insofar as such payments are obtained through the Tribe's rights as lessor.

The Jicarilla Apache Tribe has no power or authority to exact funds from mineral lessees of the Tribe, except pursuant to the lawful lease terms binding the lessees and the Tribe. The facts present in this case are, quite simply, that the lessor executed several mineral leases with Petitioners, all of whom are mineral producers. Each lease provided for specific compensation to the lessor—rents, royalties, and cash bonuses. Subsequently, the lessor sought to exact additional compensation from the lessees in the form of a "severance tax." The lessees have sought a declaratory judgment and an injunction to prohibit enforcement of the lessor's unilateral decision to charge the lessees more than is provided by the terms of the lease between the parties. The lessor is an Indian tribe and the lessees are not members of the Tribe. *Amicus* submits that the lessor's status as a Tribe does not alter the outcome of this contractual dispute.

The Jicarilla Apache Tribe asserts its ability to tax Petitioners is one of its inherent sovereign powers. While recent decisions of this Court "tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes," *McClanahan v. Arizona State Tax Commission,* 411 U. S. 164, 172 (1973), there can be no doubt that tribal sovereignty exists in some form and to limited extents. Of course, "sover-

eignty" is a misnomer for the doctrine because of its primary limitations: powers may be lost through treaty provisions and express federal statutes, and Indian tribes are prohibited from exercising powers which are inconsistent with tribal status as aggregations of wards of the United States. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 208 (1978).

There is no contention that the Jicarilla Apache Tribe's asserted power is the subject of any express treaty provision or federal statute. No such power was expressly reserved by the Tribe and no such power has been expressly conferred on the Tribe by Congress. *Cf., United States v. Mazurie,* 419 U.S. 544 (1975). The question is whether the power to tax, possessed by true sovereigns, has been the subject of implicit divestiture because the Petitioners herein are not members of the Jicarilla Apache Tribe.[6]

Tribes possess some sovereign powers over internal tribal affairs affecting tribal members. *United States v. Wheeler,* 435 U.S. 313 (1978); *Talton v. Mayes,* 163 U.S. 376 (1895). *See, Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). But that is not the case here. The livelihood of nonmembers is what the Jicarilla Apaches assert power to control. This Court has explained that the

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6. Petitioners have argued in their Petition for Writ of Certiorari, pp. 11-12, that the 1848 Treaty of Guadalupe Hidalgo resulted in a total divestiture of all sovereignty held by Indian groups within the territory annexed by the United States pursuant to that Treaty. The argument has merit for areas subject to the Treaty, as Judge Seth's dissent below confirms. However, because of the possible far-reaching consequences of this Court's decision, the sovereignty analysis applicable outside the area subject to the 1848 Treaty is presented.

> areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.
>
> *United States v. Wheeler, supra,* 435 U. S. at 326.

Oliphant v. Suquamish Indian Tribe, supra, holds that Indian tribes have no inherent power to try, convict, and punish nonmembers of the tribe for violations of tribal law. Tribal advocates would have the courts narrowly construe this decision to not apply to all public laws of the tribe, or to affect only those situations where bodily imprisonment is the only prescribed punishment for violating tribal laws. But a complete reading of *Oliphant* shows that these restrictions are not warranted. Citing this Court's earliest pronouncement concerning the status of Indian tribes, *Oliphant* emphasized that tribes have no governmental powers over nonmembers. *Oliphant v. Suquamish Indian Tribe, supra,* 435 U. S. at 209, citing *Fletcher v. Peck,* 10 U. S. (6 Cranch) 87, 147 (1810).

By asserting the power to tax non-Indians, the Tribe is attempting to exercise governmental power over individuals and entities who are not, and can never become, members of the Tribe. Such an assertion directly conflicts with the holding in *Oliphant.*

The limitations on tribal powers result from the tribe's dependent status within the territorial sovereignty of the United States. Tribes do not possess the power or the "freedom independently to determine their external relations" with nonmembers, *United States v. Wheeler, supra,* 435 U. S. at 326, because "their exercise of separate power is constrained so as not to conflict with the interests of [the United States'] overriding sovereignty." *Oliphant v.*

Suquamish Tribe, supra, 435 U. S. at 209. And, as *Oliphant* explained,

> from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.
>
> *Oliphant v. Suquamish Indian Tribe, supra,* 435 U. S. at 210.

Of course, an ordinary criminal prosecution, as was involved in *Oliphant,* is "*an* important manifestation" of the power to restrict the liberties of nonmembers. *Oliphant v. Suquamish Indian Tribe, supra,* 435 U. S. at 210. But it is not the only way. There are other ways, such as the extortion by which the Jicarilla Apache Tribe is attempting to exact the taxes in this case. Even if a technical distinction can be made between one's personal liberty and one's personal property and livelihood, there can certainly be no argument that the United States does not manifest equally "great solicitude" for the property rights of its citizens.

The question here is not whether Petitioners can financially afford the additional payments to the Jicarilla Apache Tribe. They probably can. Rather, the question is whether nonmembers of a tribe *should* be forced to bear involuntary, unilaterally-imposed, financial burdens, particularly after executing valid leases which define the terms of the relationship between the nonmember Petitioners and the Respondent Tribe.

There is no significant distinction between the facts of *Oliphant* and the facts of this case. They both involve tribal power over nonmembers of the tribe, and the further

this case is allowed to progress, the closer and closer the two cases become in all particulars. Under *Oliphant,* the Jicarilla Apache Tribe may not imprison Petitioners for refusing to pay the exaction. Can it be argued that *Oliphant* was intended to permit tribes to seize all of the nonmember's on-reservation property as ransom to insure compliance with tribal law, particularly when the nonmembers were lured onto the reservation under valid leases, and when the nonmembers have no appeal, no remedy, and no voice in tribal government?

The Jicarilla Apache Tribe has certain powers and rights in its relationships with these non-Indian Petitioners, but that power clearly does not have as its basis "sovereignty." Rather, as the courts have recognized for nearly a century, it is the power of a beneficial landowner.

In *Morris v. Hitchcock,* 194 U. S. 384 (1904), a Chickasaw permit fee imposed on non-Indians was upheld because the Tribe had reserved in its treaties with the United States "the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory." This power was not based on any sovereign governmental authority, but rather on proprietary rights retained in the applicable treaties to exclude nonmembers from tribal lands.

Maxey v. Wright, 54 S. W. 808 (Ind. Ter., 1900), *aff'd,* 105 Fed. 1003 (1900), and *Buster v. Wright,* 135 Fed. 947 (8th Cir. 1905), both presented situations strikingly similar to that of *Morris, supra.* The courts were dealing with license fees, not ordinary taxes. The truly optional nature of the fees, paid in exchange for the privilege of pursuing certain businesses within the tribe's territory, was em-

phasized in *Buster v. Wright, supra,* 135 Fed. at 949. The Eighth Circuit also recognized some of the pertinent limitations on the Tribe's rights:

> The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been *destroyed or limited* by act of Congress or *by the contracts of the Creek tribe itself.* (Emphasis supplied.)
>
> *Buster v. Wright, supra,* 135 Fed. at 950.

The Jicarilla Apache Tribe relies heavily on two Eighth Circuit decisions. Both of those decisions purported to follow *Buster v. Wright, supra, Maxey v. Wright, supra,* and, *Morris v. Hitchcock, supra.* However, the Circuit Court overlooked its own precedents in *Iron Crow v. Oglala Sioux Tribe,* 231 F. 2d 89, 98-99 (8th Cir. 1956), and appeared to uphold a tribal tax or fee solely on the basis of inherent tribal sovereignty. The decision, therefore, relied upon certain decisions to reach a conclusion which the earlier decisions reject. This decision was not reviewed by the Supreme Court. Instead, the Circuit repeated its error in *Barta v. Oglala Sioux Tribe,* 259 F. 2d 553 (8th Cir. 1958), *cert. denied,* 358 U. S. 932 (1959).

The mistaken conclusion of law in *Iron Crow* and *Barta* is the only support for the Tenth Circuit's decision in this case. The "tribe's retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments." *Oliphant, supra,* 435 U. S. at 208. The Tenth and Eighth Circuits have not applied the relevant limitation on tribal sovereignty—that the tribe lacks the power to govern nonmembers—and so the Tenth

Circuit's decision is incorrect in light of recent decisions by this Court.[7]

To summarize, the tribal sovereignty doctrine does not permit the Jicarilla Apaches to impose this tax on these Petitioners because such a power would be inconsistent with the status of American Indian tribes. The asserted taxation power conflicts with the interests of the United States in protecting its non-tribal citizens' rights from unwarranted intrusions. Tribal rights in this case, as recognized by the courts, are proprietary rights permitting the Tribe to condition the terms upon which non-Indians may enter the reservation. And those proprietary rights were fully exercised by the Jicarilla Apache Tribe when it voluntarily leased its mineral interests for the agreed upon valuable consideration.

II. Regardless of any tribal ability to exact funds from nonmember lessees, the various states possess the power to tax mineral production on Indian reservations.

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7. This Court recently alluded to the question here in *Washington v. Confederated Tribes of the Colville Reservation*, — U. S. —, 65 L. Ed. 2d 10, 28-29 (1980). Of course, *Colville* presented questions of state taxation—not tribal taxation—of non-Indians on reservations. The Court recognized that the tribal taxation present was not dispositive of the case by explaining that the Opinion's dicta was "probably" correct. Further, there is a very real difference in terms of a non-Indian's options, as emphasized in *Buster v. Wright, supra*, 135 Fed. at 949, between a one-time purchase of cigarettes and the on-going and capital intensive business of producing minerals pursuant to valid leases.

Part II of this Brief is submitted to this Court for two purposes. First, to apprise this Court of the substantial interest the State of Montana has not only in the eventual outcome of this case, but also in the language used by the Court in reaching its decision. Second, Amicus submits that the existence of state taxation authority over all mineral production on all Indian lands is the best evidence available showing Congress' understanding of the respective taxation powers, or lack thereof, of the states and tribes.

A. States Have the Power to Tax Non-Indian Lessees of Indian Lands Producing Minerals on Indian Reservations.

The main issue in this case is whether the Jicarilla Apache Tribe has the inherent sovereign power to tax non-Indians producing oil and gas on the Jicarilla Reservation under leases from the Tribe which predate enactment of the Tribe's taxation code. The right of the State of New Mexico to tax Petitioners is in issue to the extent that such right was challenged by the Respondent to buttress its argument that the Tribe possesses exclusive taxation authority.

States possess extensive power to tax non-Indians within the boundaries of Indian reservations. States may impose income taxes on non-Indian lessees of Indian lands. *Helvering v. Mountain Producers Corp.*, 303 U. S. 376 (1938) [overruling *Gillespie v. Oklahoma*, 257 U. S. 501 (1922)]. States may also impose sales taxes on sales to non-Indians on reservations, even when the seller is an Indian or Indian organization. *Moe v. Confederated*

Salish and Kootenai Tribes, 425 U. S. 463 (1976). Whenever property on a reservation passes from Indian to non-Indian ownership, it becomes subject to state taxation. *Choctaw, O. & G. R. R. v. Mackey*, 256 U. S. 531 (1921).

It is well established that lessees of Indian trust land are subject to non-discriminatory state taxes as long as no Indian or tribe is liable for payment and the tax creates no encumbrance on trust land or Indian property. *Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342 (1949). *See also, Ft. Mojave Tribe v. San Bernardino County*, 543 F. 2d 1253 (9th Cir. 1976); *Agua Caliente Band v. County of Riverside*, 442 F. 2d 1184 (9th Cir. 1971), *cert. denied*, 405 U. S. 933 (1972). In *Thomas v. Gay*, 169 U. S. 264, 273 (1898), it was noted that "a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax on the lands or privileges of the Indians," so this Court concluded that the state may tax cattle of non-Indians grazing on tribal lands under a lease from the Indians.

Thus, many state taxes have been held to apply within Indian reservations, most frequently when the tax is exacted from a non-Indian. Each state tax, as it may be questioned in this context, must be carefully scrutinized. If the legal incidence of the tax falls upon a non-Indian, the tax must be upheld as a valid exercise of the state's rights to tax citizens within its territory. This remains the rule even if the measure of the tax is the value of the property leased from an Indian tribe, *Thomas v. Gay*, *supra*, even if the tax results in economic detriment to an Indian tribe, and even if the subject matter is identical to that purportedly taxed by an Indian tribe. *Washing-*

ton v. Confederated Tribes of the Colville Indian Reservation, — U. S. —, 65 L. Ed. 2d 10 (1980).

B. Congress Has Provided That States May Tax Indian Interests in Mineral Production on Indian Reservations.

In 1924, Congress enacted 25 U. S. C. § 398 (hereafter "the 1924 Act") which specifically authorized the states to tax all mineral production on treaty reservations. In 1927, Congress extended this specific taxation authorization to Executive Order Indian reservations such as the Jicarilla Apache's by enacting 25 U. S. C. § 398(c) (hereafter "the 1927 Act"). These authorizations apply to Indian interests in mineral development, such as rents and royalties, as long as the taxes do not become a lien against the land or other property of the Indians.[8] Since these taxing provisions are not limited by their terms to leases or operations pursuant to any specific statutory scheme, they apply equally to leases given under the 1924 Act, the 1927 Act, or 25 U. S. C. §§ 396a-396f (hereafter "the 1938 Act"). Unless 25 U. S. C. § 398(c) has been repealed by the 1938 Act, § 398(c) clearly authorizes the State of New Mexico to impose its taxes on oil and gas production on the Jicarilla Apache Reservation.

The question, then, is whether the 1938 Act, by its extensive procedural leasing requirements or by its general repealing clause, repealed the explicit tax authoriza-

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8. As discussed in Part II(A) of this Brief, the states have always had the power to tax non-Indians' mineral production on Indian reservations. The 1924 and 1927 Acts extend the states' taxing authority and allow states to tax the royalty interests of Indian tribes.

tions included in the 1924 and 1927 Acts. According to the customary and applicable rules of statutory construction, no such repeal occurred. The repealing effect of statutes must be either express or by necessary implication. *I Sutherland On Statutory Construction* (3rd Ed., 1943), Sec. 2013, page 467. There is no clause in the 1938 Act which expressly repeals prior taxing provisions. If those taxing provisions were repealed by the 1938 Act, the repeal must have been accomplished by implication.

There are certain rules of statutory construction which control this case. First, there is a strong legal presumption against repeals by implication. *United States v. Borden Co.*, 308 U. S. 188, 198 (1939); *Frost v. Wenie*, 157 U. S. 46, 58 (1895). In *United States v. Greathouse*, 166 U. S. 601 (1877), the Supreme Court said:

> But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and they are not *absolutely irreconcilable*, effect should be given, if possible, to both of them.
>
> 166 U. S. at 605. (Emphasis supplied.)

It is also well settled that the courts will not use a strained construction of a statute in order to find an inconsistency. *United States v. Noce*, 268 U. S. 613 (1925). Inconsistency is never presumed, and will not be found if *any other reasonable construction* exists. *Frost v. Wenie, supra.*

It must be pointed out what is not involved in this case. First, a traditional Indian tax exemption is not in issue because that exemption was expressly stricken by the 1924 and 1927 Acts. Thus, the canon prohibiting implied repeal of Indian tax exemptions, *see, Bryan v. Itasca*

County, 426 U. S. 373 (1976), and *Choate v. Trapp,* 224 U. S. 665 (1912), is not applicable. Second, this case does not involve ambiguous statutes. The 1924 and 1927 Acts specifically allow taxation and the 1938 Act is totally silent on taxation. Thus, another canon of construction requiring that ambiguous expressions be resolved in favor of Indians, *see, Bryan v. Itasca County, supra,* is also inapplicable.

The usual and customary rules of statutory construction are not obviated merely because the Jicarilla Apache Tribe is a party in this action. Since the passage of the 1927 Act, the Jicarilla Apache Tribe has been in the same position as non-Indian taxpayers. To claim an exemption from a New Mexico tax, the Tribe must cite an express statutory authority proving that it is entitled to tax-free status. The argument that the express provision of the 1927 Act was repealed by the silence of the 1938 Act simply does not suffice to show that the Tribe is entitled to be exempt from New Mexico taxes.

When the appropriate rules of statutory construction are used, it is apparent that the 1924 and 1927 Acts were not repealed by the 1938 Act. There is no provision in the 1938 Act which mentions in any way the states' authority to impose taxes relating to mineral production on Indian reservations. Considering all three Acts together, only the 1924 and 1927 Acts relate to taxation. There is no inconsistency on this point. The 1938 Act could not have repealed the 1924 and 1927 Acts by implication.

Respondents argued below that the general repealing clause and the "comprehensiveness" of the 1938 Act

repealed the taxing provisions of the 1927 Act. These arguments are erroneous, misleading, and even mutually inconsistent.

> An express general repealing clause to the effect that all inconsistent enactments are repealed, is in legal contemplation a nullity. . . . If its conclusion is more than mechanical verbiage, it is more often a detriment than an aid to the establishment of a repeal, for such clause is construed as an express limitation of the repeal to inconsistent acts.
>
> *I Sutherland, supra,* at 466-468.

In *Hess v. Reynolds,* 113 U.S. 73, 79 (1885), this Court construed an identical clause. It was held that such a clause "implies very strongly that there may be acts on the same subject which are not thereby repealed." The inclusion of such a general repealing clause in the 1938 Act "indicates plainly the intention of Congress to leave in force some portions of former acts relative to the same subject matter." *United States v. Henderson,* 78 U.S. (11 Wall.), 652, 656 (1870).

To the extent that the repealing clause of the 1938 Act means anything at all, it means that the Act was *not* intended to be comprehensive to the exclusion of all existing statutes relating to mineral leasing of unallotted Indian lands. Congress well knew how to repeal the taxing provisions contained in the 1924 and 1927 Acts. Had Congress intended to create a tax exemption, it would have done so as it always does—expressly, and not by implication.

The historical context of the 1938 Act confirms that Congress did not repeal the 1924 and 1927 Acts by implication. The 1930s were a time of heightened activism

among Indian tribes, the Congress, and the courts. Preceding 1930, two events formed the base for what was to develop during the decade: first, the United States Supreme Court had applied the "federal instrumentality" doctrine to oil and gas production on Indian lands, thereby prohibiting state taxation, *Gillespie v. State of Oklahoma,* 257 U.S. 501 (1922), and second, Congress had expressly rejected that doctrine as the Court applied it to Indian lands by passing the 1924 and 1927 Acts. In 1934, Congress approved the Indian Reorganization Act.[9] In 1936, this Court decided *British-American Oil Co. v. Board of Equalization,* 299 U.S. 159 (1936), holding that oil and gas production on Indian lands was subject to state taxation. On March 7, 1938, this Court expressly overruled *Gillespie, supra,* and the federal instrumentality doctrine. *Helvering v. Mountain Producers Corp., supra.* Slightly more than two months later, on May 11, 1938, Congress passed a mineral leasing act which was silent on the subject of taxation.

These events indicate that Congress intended to leave the authorizations of the 1924 and 1927 Acts intact. Under applicable rules of statutory construction, however, congressional intent to leave a tax authorization intact need not be found. What is important is Congress' lack of legislation expressly creating an exemption, because absent express creation of a tax exemption, legislative intent

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9. 25 U.S.C. §§ 461, *et seq.*

has no affect.[10] Congress was aware of its then-in-vogue Indian policy; it was well aware of the 1924 and 1927 Acts and the decisions of this Court giving those Acts a specific effect; Congress was well aware that the courts would, under customary rules of statutory construction, continue to give the 1924 and 1927 Acts the meaning given them by the Supreme Court unless Congress expressly rejected that specific effect in subsequent legislation; Congress was well aware of the ease with which a tax exemption can be created; and it was well aware that the 1938 Act contained no such exemption.

CONCLUSION

Amicus has not located any definitive holding on the question of whether New Mexico's taxing authority is exclusive in this case. *Amicus* contends that such authority is exclusive on the ground that the Tribe lacks the sovereign power to tax non-Indians lawfully on the reservation pursuant to leases with the Tribe, as argued in Part I of this Brief. As shown in Part II of this Brief, Congress vested taxing authority over tribal mining interests in the states, and *Amicus* submits that this demonstrates the historical assumption that tribal taxation

10. Nevertheless, such lack of intent is demonstrated as much as is possible by the Department of Interior's letter transmitting the 1938 Act to the House of Representatives, see, Cohen, Handbook of Federal Indian Law (1942), p. 328, wherein the existence of state taxation is not even mentioned as a problem intended to be remedied by the 1938 Act.

of non-Indians is not a retained sovereign power of tribes because such power would be inconsistent with tribal status.

The opinion of the Tenth Circuit Court of Appeals should be reversed. The Jicarilla Apache Tribe does not possess the inherent sovereign power to tax non-Indians because such a power is inconsistent with the status of dependent Indian tribes. Only the State of New Mexico possesses the power to tax mineral production by these Petitioners.

DATED this 20th day of November 1980.

Respectfully submitted,

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